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No. 99-956

IN THE

Supreme Court of the United States

THE STATE OF TEXAS, TEXAS DEPARTMENT OF HUMAN SERVICES, TEXAS DEPARTMENT OF HEALTH, and TEXAS HEALTH AND HUMAN SERVICES COMMISSION,

Cross-Petitioners,

v.

UNITED STATES OF AMERICA *ex rel.* JAMES M. CHURCHILL,

Cross-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

The question presented by this cross-petition is also presented in No. 98-1828, *State of Vermont Agency of Natural Resources v. United States ex rel. Stevens*, argued before this Court on November 29, 1999, and is as follows:

> Whether a State is a "person" subject to suit under the False Claims Act, 31 U.S.C. § 3729 *et seq.*

PARTIES TO THE PROCEEDING

The parties in the United States Court of Appeals for the Fifth Circuit were the United States of America (which intervened in the appeal), *qui tam* plaintiff James M. Churchill, and defendants the State of Texas, the Texas Department of Human Services, the Texas Department of Health, and the Texas Health and Human Services Commission.

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The United States *ex rel.* James Churchill opposes the Conditional Cross-Petition for Writ of Certiorari filed by The State of Texas, Texas Department of Health, and Texas Health and Human Services Commission.

OPINIONS BELOW

Neither the opinion of the court of appeals (Petitioner's appendix at App. 1a – App. 2a) nor the opinion of the district court (Petitioner's appendix at App. 3a – App. 43a) is reported.

STATEMENT OF JURISDICTION

Although the court of appeals had jurisdiction over the Eleventh Amendment question presented by cross-respondent's petition, it did not have jurisdiction to resolve the statutory question presented by this cross-petition. *See Swint v. Chambers County Comm'n*, 514 U.S. 35, 49-50 (1995). Cross-petitioners brought their interlocutory appeal from the district court's denial of their motion to dismiss. The statutory issue is not independently appealable, was not certified by the district court, and is not "inextricably intertwined" with the Eleventh Amendment issue that is the subject of this interlocutory appeal. Accordingly, the statutory challenge was not properly before the court of appeals and should not be addressed by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portions of the False Claims Act, 31 U.S.C. §§ 3729-3733, are reproduced in the Petitioner's appendix at App. 44a – App. 61a.

STATEMENT OF THE CASE

1. Originally enacted in 1863, the False Claims Act ("FCA"), now codified at 31 U.S.C. §§ 3729-3733, is the federal Government's "primary litigative tool for combating fraud" committed by all "unscrupulous contractors and grantees." S. Rep. No. 345, 99th Cong., 2d Sess. 8 (1986), *reprinted in*, 1986 U.S.C.C.A.N. 5266, 5273. Under the Act, any person who knowingly presents or causes to be presented a false or fraudulent claim to the United States for payment or approval is liable to the Government for three times the amount of damages the Government sustains because of that person's act plus penalties for each false claim submitted.

In 1986, Congress substantially amended the FCA and, in particular, its *qui tam* provisions. Section 3730(b) allows any person to bring an FCA suit in the name of the Government to recover damages suffered by the United States and to share in any recovery obtained as a result of the suit. The *qui tam* plaintiff, known as a relator, initiates a suit by filing a complaint under seal in a United States District Court. Simultaneously, the relator must serve a copy of the complaint on the federal Government together with a written disclosure describing all information and evidence in the relator's possession relating to the case. 31 U.S.C. § 3730(b)(2).

The United States then has at least 60 days to investigate the relator's allegations and determine whether to intervene and proceed with the action. *Id.* § 3730(b)(3). If the United States intervenes, the action is formally conducted by the Government. *Id.* § 3730(b)(4)(A). If the Government chooses not to officially intervene, the relator has the right to proceed

with the action in the Government's name. In either event, the Government retains the right not only to recoup the lion's share of any recovery, but also to force dismissal of the action or impede any proposed compromise of the claim. *See id.* §§ 3730(c)(2) and (3).

2. Realtor James M. Churchill filed this *qui tam* action under seal on June 24, 1997, in the Western District of Texas, Pecos Division. Churchill alleged that defendants the State of Texas, Texas Department of Human Services, Texas Department of Health and Texas Health and Services Commission (hereinafter collectively "the State defendants") violated the FCA by submitting false claims to the United States under the federal Government's Medicaid program (referred to as "Medicaid").

The Medicaid program is highly regulated. Among the regulations to which state Medicaid programs are subject are those requiring states to identify and pursue collection from any third party who might be liable to pay for the care and services provided or available under the program. Monies collected from responsible third parties must be used to reimburse, first the federal Government, and then the State, for amounts expended for medical care under the Medicaid program. By regulation, federal financial participation, which exceeds sixty percent of the total Medicaid expenditures in Texas, is unavailable if a State fails to follow the regulations governing recovery of Medicaid funds from third-party sources.[1] Specifically, relator alleged that in violation of applicable laws and regulations, defendants knowingly submitted claims for federal financial participation despite

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1. *See* 42 C.F.R. § 433.140 (1997).

having failed to comply with the regulatory requirements governing third-party tort liability.[2]

3. Pursuant to the United States' *ex parte* application for an extension of time to determine whether to intervene, the District Court extended the 60-day seal period to March 15, 1998. On March 16, 1998, after noting that the Government had not sought a further extension, the District Court ordered the clerk to unseal Churchill's complaint. The State defendants were then served. The State defendants moved to dismiss contending, first, that the State is not a "person" under the FCA, and second, that the Eleventh Amendment bars the suit. Churchill responded, as did the United States, which sought and obtained leave to file a brief in opposition to the State defendants' motion to dismiss.

4. In an order filed June 4, 1998, the District Court denied the State defendants' motion on both grounds. (Petitioner's appendix at App. 42a – App. 43a). The State defendants timely appealed. The District Court has stayed most of the proceedings below during the pendency of the appeal.

5. On October 21, 1998, the Fifth Circuit granted the United States' motion to intervene as a matter of right under 28 U.S.C. § 2403 as a plaintiff-appellant in the appeal so that it could defend the constitutionality of the *qui tam*

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2. Relator also sued National Heritage Insurance Company ("NHIC"), with which the Texas Department of Human Services (and later the Texas Department of Health) contracted to provide various services, including investigating, identifying and pursuing all third-party liability sources. Relator alleged, *inter alia*, that NHIC caused the submission of false claims by failing to pursue reimbursement from liable third-party tort-feasors.

provisions of the False Claims Act as they applied to State defendants.

6. On March 29, 1999, a Fifth Circuit panel issued its opinion in *United States ex rel. Foulds v. Texas Tech University*, 171 F.3d 279 (5th Cir.), *petition for cert. filed*, No. 99-513 (Aug. 27, 1999), a case presenting the same issues as the instant one. The Court in *Foulds* reversed the district court's denial of the State's motion to dismiss, holding that "when the United States has not actively intervened in the action, the Eleventh Amendment bars qui tam plaintiffs from instituting suits against the sovereign states in federal court." *Id.* at 294. Because the Fifth Circuit determined that the Eleventh Amendment presented a "threshold jurisdictional issue," it did not address the statutory question also presented — whether the State is a "person" under the FCA. *Id.* at 288, 294.

7. On August 5, 1999, another panel of the Fifth Circuit issued a three-paragraph unpublished opinion in the instant case, reversing the District Court's denial of the State defendants' motion to dismiss and remanding for entry of a judgment dismissing the claims against the State defendants. The panel's decision was based upon its determination that it was bound by the prior decision in *Foulds*, which it described as holding that the Eleventh Amendment bars qui tam suits against States in federal court when the United States has not actively intervened. (Petitioner's appendix at App. 2a).

REASONS FOR DENYING THE CROSS-PETITION

As explained further below, the court of appeals did not have jurisdiction to decide the statutory issue presented by

this cross-petition. Accordingly, the issue is not before the Court, and the conditional cross-petition should be denied.

Alternatively, the conditional cross-petition should be held pending the decision in *State of Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828 (certiorari granted June 24, 1999 and argued Nov. 29, 1999). The conditional cross-petition here concerns whether a State is a "person under the FCA, an issue raised squarely in *Stevens*. The Court's resolution of *Stevens* will govern disposition of this case.

I. BECAUSE THE COURT OF APPEALS LACKED JURISDICTION OVER THE STATUTORY QUESTION PRESENTED, THIS COURT MAY NOT CONSIDER THEM.

The court of appeals in *Foulds*, the decision upon which the court of appeals relied in the instant case, did not address the statutory arguments made here, because it viewed the Eleventh Amendment issue as a jurisdictional question that must be determined first. *Foulds*, 171 F.3d at 285. Having found the suit in *Foulds* barred by the Eleventh Amendment, the statutory question was not reached. *Id.* at 288 ("if the Eleventh Amendment removes our jurisdictional authority to hear Fould's case, we have no power to determine whether . . . states are "person[s] under the Act."). Even if the court of appeals had decided the Eleventh Amendment question differently in *Foulds*, however, it would not have had jurisdiction over the statutory question in that case or the instant one.

The court of appeals in *Foulds* and in this case had jurisdiction to hear the State defendants' interlocutory appeal

from the district court's denial of their claims of Eleventh Amendment immunity under the collateral order doctrine, as adopted in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) and applied in *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). In *Cohen*, the Court recognized a narrow exception to the final judgment rule, holding that an appeal could be taken from an interlocutory order that finally determines "claims of right separable from, and collateral to, rights asserted in the action." *Cohen*, 337 U.S. at 546. In *Puerto Rico Aqueduct*, the Court held that the *Cohen* exception applied to a district court order denying an Eleventh Amendment immunity claim, reasoning that the immunity from suit conferred by the Eleventh Amendment "is effectively lost if a case is erroneously permitted to go to trial." *See id.* 506 U.S. at 144, 147.

The rule announced in *Cohen* and applied in *Puerto Rico Aqueduct*, however, does not provide a basis for jurisdiction over the district court's determination that States are "person[s]" within the meaning of the FCA. Courts of appeals do not have discretion "to append to a *Cohen*-authorized appeal from a collateral order further rulings of a kind neither independently appealable nor certified by the district court." *Swint v. Chambers County Commission*, 514 U.S. 35, 47 (1995).[3] Consequently, orders denying defenses to liability, rather than immunity from suit, do not fall within the *Cohen* rule. *Id.* at 43.

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3. The Court viewed pendant jurisdiction as undermining the two-tiered arrangement mandated by 28 U.S.C. § 1292(b). 514 U.S. at 47. The Court further reasoned that "a rule loosely allowing pendant appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." *Id.* at 49-50.

The State defendants' claim that they are not "person[s]" who can be subject to FCA liability is not a claim of immunity from suit, but rather, is simply an ostensible defense to liability that is easily and effectively reviewable after final judgment. Although *Swint* left open the possibility that courts of appeals might have jurisdiction to review an otherwise non-appealable ruling that is "inextricably intertwined" with an appealable interlocutory order or that must be decided to ensure "meaningful review" of the appealable issue, neither circumstance is present here.

The question of Eleventh Amendment immunity is not "inextricably intertwined" with the statutory question presented in the conditional cross-petition, because a court of appeals could fully determine the appealable constitutional issue on the assumption that States are "persons" under the FCA. In the past, this Court has done precisely that. *See Will v. Michigan Dep't. State Police*, 491 U.S. 58, 63 n.4 (1989) (noting "a number of cases" that addressed the issue of a State's Eleventh Amendment immunity without addressing the meaning of "person" in 42 U.S.C. § 1983, because resolution of that issue was unnecessary to the decision in those cases). Moreover, the Eleventh Amendment question is much narrower than the statutory question. Adopting the State's construction of the term "person" under the FCA would preclude even suits brought by the Attorney General, against whom the Eleventh Amendment immunity claim justifying the State defendant's interlocutory appeal could not have even been made.

Nor is it necessary to determine the statutory question in order to ensure "meaningful review" of the Eleventh Amendment issue. In sum, *Swint* precluded the court of

appeals here from addressing the "person" issue and should preclude the Court from addressing it here.[4]

II. EVEN ABSENT THE JURISDICTIONAL IMPEDIMENT, THE CONDITIONAL CROSS-PETITION SHOULD BE DENIED, OR IN THE ALTERNATIVE, HELD PENDING THE OUTCOME OF *STEVENS*.

Even if this Court were to determine that it could consider the statutory question posed by the State defendants, it should nonetheless deny the cross-petition. The State defendants' arguments are based upon their erroneous contention that *Will v. Michigan Dep't. of State Police*, 491 U.S. 58 (1989) commands that "the plain meaning" of the word person "excludes" States unless Congress has made a

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4. Shortly after the Fifth Circuit decided *Foulds*, the District of Columbia Circuit issued its opinion in *United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870 (D.C. Cir.), *supplemented*, 173 F.3d 890 (D.C. Cir. 1999), *petition for certiorari filed* August 2, 1999 (No. 99-213). The *Long* court disagreed with the Fifth Circuit's reasoning regarding the order in which the questions presented should be decided, holding that the statutory question should be addressed first because that approach had "the significant virtue of avoiding a difficult constitutional question." *Id.* 173 F.3d at 898. With due respect to the District of Columbia Circuit, it would be anomalous indeed to address a question not before the court in order to avoid deciding the only question over which the court has jurisdiction. Moreover, the cases upon which the District of Columbia Circuit relied to support its analysis were not cases involving questions appealable only under the collateral order doctrine; rather in those cases, the Court was choosing the order of decision with respect to questions that were each clearly appealable, either under the final judgment rule or a statute allowing interlocutory appeal.

"plain statement" referring to them by name. The State defendants misread *Will* and are wrong in assuming that any "plain statement" canon applies to this case.

1. Two and a half years after deciding *Will*, this Court rejected the contention that *Will* adopted "a *per se* rule prohibiting the interpretation of general liability language to include the states, absent a clear statement by Congress to the effect that Congress intends to subject the states to the cause of action." *Hilton v. South Carolina Public Railways Comm'n.*, 502 U.S. 197, 205 (1991). Indeed, this Court has repeatedly held that " 'there is no hard and fast rule of exclusion' of the sovereign." *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 83 (1991). (Quoting *United States v. Coopen Corp.*, 312 U.S. 600, 604-05 (1941)). Accordingly, this Court has construed the term "person" to reach the States, especially when, as here, the purpose of the act in question "is as capable of being obstructed by state as by individual action." *United States v. California*, 297 U.S. 175, 186 (1936); *see also Jefferson County Pharm. Ass'n. v. Abbott Labs.*, 460 U.S. 150, 154-55 & nn.10 & 11 (1983) (noting that the statutory language at issue was sufficiently broad to cover governmental bodies); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 91-92 (1934) (noting that "many times [it] has been held that . . . a state is a 'person' within the meaning of statutory provisions applying only to persons" and citing cases); *Ohio v. Helvering*, 292 U.S. 360, 371 (1934) (rejecting contention that state is not embraced within the meaning of the word "person" in statutory provision that imposes a tax upon every "person who sells" liquor).

In sum, the "plain statement" rule discussed in *Will* and clarified in *Hilton* is "an 'ordinary rule of statutory

construction,' " *Hilton*, 502 U.S. at 205 (quoting *Will*, 491 U.S. at 65), that comes into play only at the end of the statutory construction process and only then if it has been determined that the statute at issue is ambiguous. *See Salinas v. United States*, 522 U.S. 52, 60 (1997) ("The rules of statutory construction we have followed to give proper respect to the federal-state balance . . . d[o] not apply when a statute [is] unambiguous.").

2. The State defendants' argument is further flawed because it ignores the fact that the FCA makes "any person" liable to the United States for fraud perpetrated against the federal government. The State defendants are unable to cite any cases from this Court that apply the plain statement rule to a federal statute creating a right of action in favor of the United States. Indeed, the Court has rejected the notion that "stringent interpretative principle[s]" apply to the construction of statutes authorizing suits by the federal government against the states. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 11 (1989).[5]

3. In sum, if "[t]he purpose, the subject matter, the context, the legislative history, [or] the executive interpretation of the statute . . . indicate an intent, by use of the term, to bring state or nation within the scope of the law," then the term "person" will be construed to include States and other sovereigns. *International Primate Protection League*, 500 U.S. at 83; *see also Sims v. United States*, 359 U.S. 108, 112 (1959) ("Whether the term 'person' used in a federal statute includes a State cannot be abstractly declared,

5. This Court's subsequent repudiation in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), of the Eleventh Amendment holding in *Union Gas* left intact the statutory analysis adopted by a clear majority of the *Union Gas* Court.

but depends upon its legislative environment. . . ."). Applying this standard to the FCA leads to the inescapable conclusion that the State defendants' arguments are misdirected.

This Court has interpreted the original FCA as "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968); *see also United States el rel. Marcus v. Hess*, 317 U.S. 537, 544 (1943) (object of original FCA "was to provide protection against those who would 'cheat the United States.' "). The wide range of conduct prohibited by the original Act, as well as the Act as amended in 1986, supports the above interpretation. *See* 31 U.S.C. §§ 3729-3733; the False Claims Act (original), Act of March 2, 1863, Ch. 67, 12 Stat. 696 (1863).

In 1986, Congress repealed the entire paragraph that formerly defined the scope of the Act to "[a] person not a member of an armed force of the United States", replacing it with language applying the Act's proscription broadly to "[a]ny person." *See* False Claim Amendments Act of 1986, Pub. L. 99-562, 100 Stat. 3153, 3153. The 1986 amendments made other changes to the FCA that unambiguously establish Congressional intent to subject the States to suit. That intent is further expressed in the relevant committee report explaining that "[t]he term 'person' is used in its broad sense to include . . . states and political subdivisions thereof." S. Rep. 345, 99th Cong., 2d Sess. 8, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273. The State defendants' attempt to denigrate this clear expression of Congressional understanding should be rejected.

The State defendants' reliance on the CID provisions of the FCA is also misplaced. In Section 3733(l)(4), the term "person" is defined to mean "any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State." The State defendants argue that the inclusion of States in the definition of "person" applicable to Section 3733 means that States are not included within the definition of "person" elsewhere in the FCA. The problem with the State defendants' argument is that it necessarily means that the other categories of entities included in Section 3733(l)(4) would also have to be excluded from the definition of "person" in the liability section of the FCA. Since the definition of "person" in Section 3733(l)(4) is so all inclusive, adopting the State defendants' Section 3733 argument would lead to the absurd conclusion that the FCA would not apply to natural persons, partnerships, corporations, or associations, all of whom the FCA unquestionably reaches.

CONCLUSION

The conditional cross-petition for certiorari should be denied.

Respectfully submitted,

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